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SUPREME COURT, U. S.

No. 1254

In the Supreme Court of the United States

OCTOBER TERM, 1969

KENNETH GEORGE MONTOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1216

KENNETH GEORGE MONTOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1970. The petition for a writ of certiorari was filed on February 20, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a report by a government agent who testifies at a pretrial suppression hearing must be turned over to the defense for inspection before trial under the Jencks Act, 18 U.S.C. 3500.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Middle District of Florida on a two-count indictment charging him as a postal employee with theft of two parcels of mail containing coins, in violation of 18 U.S.C. 1709 (R. 1-2). On February 12, 1969, he was sentenced to imprisonment for three years, and fined $1500. The district court suspended the execution of the prison sentence and placed petitioner on probation (R. 14-16). The court of appeals affirmed (Pet. App. A).

The evidence showed that postal inspectors commenced an investigation of petitioner, a postal employee whose duties included the repair of damaged parcels, after petitioner was observed spending coins of numismatic value for coffee and doughnuts (R. 29-31). On January 24, 1968, postal officials placed two damaged parcels containing coins on petitioner's rewrap table (R. 97, 240-242). These parcels disappeared and did not reach the addressee (R. 236-237). After a third package disappeared on the following day under similar circumstances, two postal inspectors spoke to petitioner after he entered his automobile to leave work. When petitioner denied that he had handled any coin parcels the previous night, he

was given *Miranda* warnings and arrested. The inspectors found coins from the two parcels in the automobile (R. 185-197).

Prior to trial, petitioner filed a motion to suppress both the items seized from the automobile and statements that he made to the postal inspectors (R. 10). District Judge Krentzman held a suppression hearing at which one of the inspectors, J. R. Stokes, was called as the only witness (R. 24 *et seq*). During that hearing, petitioner's request under the Jencks Act, 18 U.S.C. 3500, for the report of Inspector Stokes to his superiors was denied (R. 40-42).[1] At trial, when petitioner renewed his motion to suppress (R. 100), Judge Warlick, the trial judge, held a hearing outside the presence of the jury at which Stokes and petitioner testified. Petitioner's counsel, who now had a copy of Stokes' report to his superiors, was unable to convince the district judge that the report revealed anything new (R. 137-138, 147-148, 168-172). The trial court thereupon concluded that petitioner already had his day in court before Judge Krentzman, and adhered to the original denial of the suppression motion (R. 177-184).

ARGUMENT

The court below correctly held, in accord with *United States* v. *Covello*, 410 F.2d 536, 543-545 (C.A. 2), certiorari denied, 396 U.S. 879, that a defendant is not automatically entitled to the pretrial production of a report of a government agent who testifies

[1] Petitioner was allowed to inspect some notes that the witness used while testifying (R. 44).

on a motion to suppress. The Jencks Act, 18 U.S.C. 3500, in specific terms provides that no statement shall be the subject of discovery until after a government witness has testified on direct examination "in the trial of the case." Nor does the history of that statute indicate that Congress intended conformity between motion practice and the trial on the merits. See *United States* v. *Covello*, 410 F.2d at 543. In any event, petitioner did in fact receive the report of the government agent during the course of the trial on the merits, and was allowed a further suppression hearing outside the presence of the jury. Since petitioner was then unable to point to anything of significance in the agent's report, the trial judge properly refused to set aside the pretrial ruling of another district judge denying the suppression motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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